Supreme Court, U. S.
FILED
NOV 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-651

UNITED BROADCASTING COMPANY, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY M. PLOTKIN
THOMAS SCHATTENFIELD
DAVID TILLOTSON
HARRY F. COLE
1815 H Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

November, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. The FCC's Action, Left Undisturbed By The Lower Court, Represents An Unconstitutional Infringement Affecting The Entire Broadcasting Industry	13
II. The Violation Of Certain Technical Rules Of The FCC Was Not An "Independent" Reason For United's Disqualification And Cannot, Standing Alone, Support The FCC's Denial Of The United Application	16
III. Agencies Must Not Be Permitted To Use Assertedly Independent Technical Grounds To Shield Important Constitutional Questions From Judicial Review	19
CONCLUSION	24

TABLE OF AUTHORITIES

CASES:

Board of Education v. *Barnette*, 319 U.S. 624 (1943) . 13
Brandywine-Main Line Radio, Inc., 24 FCC 2d 18 (1970), *reconsideration denied*, 27 FCC 2d 565 (1971), *aff'd sub nom. Brandywine-Main Line Radio, Inc.* v. *FCC*, 153 U.S. App. D.C. 305, 473 F.2d 16 (1972), *cert. denied*, 412 U.S. 922 (1973) ..11, 20-22
Brooklyn Broadcasting Corporation, 4 FCC 521 (1937) 18
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 14

Page

Charles C. Carlson, 12 FCC 902 (1948), *aff'd per curiam sub nom. Carlson* v. *FCC*, 84 U.S. App. D.C. 415, 172 F.2d 766, *cert. denied*, 377 U.S. 930 (1949) 17, 18
Court House Broadcasting Co., 21 FCC 2d 792 (1970) 18
FCC v. *WOKO*, 329 U.S. 223 (1946) 22
Freedman v. *Maryland*, 380 U.S. 51 (1965) 15
Heart of the Black Hills Stations, 32 FCC 2d 196 (1971), *aff'd*, No. 72-1804 (D.C. Cir., February 26, 1973) 17
Illinois Citizens Committee For Broadcasting v. *FCC*, 169 U.S. App. D.C. 166, 515 F.2d 397 (1974) 11
Palmetto Broadcasting Co., 33 FCC 250 (1962), *reconsideration denied*, 34 FCC 101 (1963), *aff'd sub nom. Robinson* v. *FCC*, 118 U.S. App. D.C. 144, 334 F.2d 534, *cert. denied*, 379 U.S. 843 (1964) ..20-22
Sherbert v. *Verner*, 374 U.S. 398 (1963) 15
Speiser v. *Randall*, 357 U.S. 513 (1958) 15
Stevens v. *Berger*, 428 F.Supp. 896 (E.D.N.Y.1977) .. 14
Teterud v. *Burns*, 522 F.2d 357 (8th Cir. 1975) 14
United States v. *Ballard*, 322 U.S. 78 (1944) 13, 14
United States v. *Rust Communications Group, Inc.*, 425 F.Supp. 1029 (E.D.Va. 1976) 7
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 14, 15
Writers Guild of America, West, Inc. v. *FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976) 11, 20

STATUTES:

U.S. Const. Amend. I .....*passim*
Communications Act of 1934:
Section 326, 47 U.S.C. § 326 .....3, 11
Section 402(b), 47 U.S.C. § 402(b) 10
18 U.S.C. § 1304 ..... 4, 8
28 U.S.C. § 1254(1) 2

FEDERAL COMMUNICATIONS COMMISSION RULES AND REGULATIONS:

§ 73.122, 47 C.F.R. § 73.122 ..... 4, 8

OTHER:

Note, "Regulation of Program Content by the FCC", 77 Harv. L. Rev. 701 (1964) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

UNITED BROADCASTING COMPANY, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner United Broadcasting Company, Inc. ("United") requests that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The decision of the Court of Appeals, which is reported at —— U.S. App. D.C. ——, —— F.2d ——, appears at Appendix A to this Petition.[1] The decision

---

[1] The appendices are separately bound in a companion volume, which is cited as "Pet. App." In addition, references to "J.A."

of the Federal Communications Commission ("the FCC"), which is reported at 55 FCC 2d 416, appears at Appendix B. The FCC's denial of United's Petition for Reconsideration and Rehearing, which is reported at 59 FCC 2d 663, appears at Appendix C. The Initial Decision of the Administrative Law Judge ("the ALJ"), which was affirmed in part and modified in part by the Commission and which is reported at 55 FCC 2d 431, appears at Appendix D.

JURISDICTION

The judgment of the Court of Appeals, which appears at Appendix E, was entered on July 8, 1977. A timely filed Petition for Rehearing and/or Suggestion for Rehearing *En Banc* was denied on August 8, 1977, by separate orders which appear at Appendix F and Appendix G, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In the FCC decision affirmed by the Court of Appeals, the FCC engaged in extended discussion of standards applicable to the broadcast of religious programming, and, concluding that United had failed to meet the standards described, found that denial of United's application for renewal of license was warranted. In the same decision, the FCC held that, without regard to the religious programming questions, denial of the United renewal application was warranted

---

are to the Joint Appendix in the lower court, containing pertinent FCC documents, hearing exhibits, hearing transcript excerpts and pleadings. A copy of the Joint Appendix, together with the rest of the record in the lower court, will be lodged with the Clerk of this Court.

on the independent ground that United had violated a number of the FCC's technical rules pertaining to the operation of broadcast stations. The Court of Appeals affirmed the FCC decision on this latter ground alone, without even referring to the religious broadcast questions discussed at length by the Commission. The question presented is:

> Whether the lower court erred in affirming the FCC's denial of a license renewal application, where the lower court failed to inquire beyond the FCC's mere assertion that certain technical factors warranted disqualification, and where that failure in effect insulated from judicial review the FCC's unconstitutional infringement of First Amendment rights respecting the broadcast of religious programming.

STATUTES INVOLVED

The First Amendment to the Constitution of the United States of America provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

STATEMENT OF THE CASE

This case involves a challenge, on constitutional grounds, to the denial by the FCC of United's application for renewal of the license of Station WOOK, Washington, D.C.[2] The basic hearing issues on which United's application was tried are as follows:

(1) To determine whether the broadcast by Station WOOK of announcements which advertised articles such as "Conquer Roots", "Money-Drawing Roots", and "Spiritual Baths", or which offered to give three-digit scripture references to be used for "financial blessings", constituted false, misleading or deceptive advertisements.

(2) To determine whether the United Broadcasting Company, Inc. has taken reasonable measures to protect its listening public from false, misleading or deceptive advertising over its facilities.

(3) To determine whether Station WOOK has broadcast announcements or information concerning a lottery in contravention of Section 1304 of Title 18 of the United States Code, and of § 73.122 of the Commission's Rules.

(4) To determine all of the facts and circumstances surrounding the operation of Station WOOK at Washington, D.C., under the management of United Broadcasting Company, Inc., with particular respect to the alleged departures from Commission Rules and Regulations and license authorization as disclosed by the Official Notice of Violation issued to the licensee in October, 1969, the responses thereto and related documents.

(5) To determine whether, in light of the evidence adduced pursuant to [the issue quoted immediately above], United Broadcasting Company, Inc., in the operation of Station WOOK, engaged in conduct which reflects such negligence, carelessness, ineptness or disregard of the Commission's processes that the Commission cannot rely upon the licensee to fulfill the duties and responsibilities of a licensee.[3]

After extensive hearings, the Administrative Law Judge ("the ALJ") found that United was qualified to remain a licensee of the FCC. However, because of the adverse effect of United's technical violations, the ALJ recommended denial of United's application on comparative grounds and grant of the competing application of Washington Community Broadcasting Co. ("Community"), the Intervenor below. 55 FCC 2d 431, Pet. App. D.

A substantial portion of the ALJ's Initial Decision related to the religious programming of Station WOOK. *See* Pet. App. D 9-49; 134-141. The overall programming of the station was black-oriented, and the religious programming in particular was directed to black listeners. The ALJ found that as many as 13 or more hours of such religious programming was regularly scheduled and broadcast on Station WOOK on

[2] Although the United renewal application was designated for hearing with other applications, one of which requested the same facilities as Station WOOK, the FCC's decision refusing to renew the WOOK license was based on absolute grounds of disqualification. The question of United's comparative qualifications relative to those of the other applicant is not present in this case.

[3] There were, in addition, issues concerning the extent of United's efforts to ascertain the needs and interests of the Station WOOK service area, and the meritorious nature of Station WOOK's programming. These issues are not relevant to this Petition.

Sundays, much of this consisting of individual ministers offering sermons. Pet. App. D 9. The religious programming of the station was under the supervision of Mr. Otis Von Blasingame, marketing and promotion manager at Station WOOK, Mr. E. Carlton Myers, general manager of Station WOOK, and Mr. Richard Eaton, the owner of United. Pet. App. D 9-10. The FCC, in its review of the Initial Decision, concluded that Mr. Von Blasingame, the son of a black minister, was familiar with the black community and black religious needs. Pet. App. B 9, n. 16. Either he, Mr. Myers or Mr. Eaton reviewed the qualifications of the ministers who appeared in order to assure themselves of the ministers' acceptability. Pet. App. D 9-10.[4]

During the sermons offered by the ministers, items such as roots and spiritual baths were advertised. The ALJ found that United discouraged advertisements of such products. Pet. App. D 36. However, he also noted that such announcements were not prohibited if it was believed that the articles were viewed by the ministers as instruments of God rather than as inherently capable of working benefits. Pet. App. D 36-37. According to the ALJ, this non-censorship policy arose from the licensee's sensitivity to and concern for First Amendment principles as they relate to religious matter. Pet. App. D 37.

In addition to his findings relative to Station WOOK's religious programming, the ALJ made ex-

[4] Testimony of Mr. Von Blasingame indicated that the *bona fides* of the ministers were established by inquiries concerning their ordination, their right to perform various sacraments, including marriage, or their association with ministers known to Mr. Von Blasingame. In the case of some non-resident ministers, respected ministers in their home cities were consulted. J.A. 634, 636, 638-642.

tensive findings with respect to the allegations of technical violations. A total of 19 violations were initially charged. Of these, the ALJ found that four of the alleged violations had been cleared, five had not been established by the FCC, and one could not have existed because there was no FCC rule on the subject that could have been violated. In addition, the ALJ found that no reliance could be placed on the FCC's measurements which underlay two other alleged violations.[5]

Thus, of a total of 19 charged violations, only seven were established before the ALJ.[6] These seven related to various measurement and logging requirements. The ALJ found that the limited technical violations, viewed in the context of United's previous technical violations, indicated that United had been careless and negligent in its operation of Station WOOK. Pet. App. D 152. The ALJ nonetheless concluded that these technical matters were "not of such degree . . . as to warrant absolute disqualification" of United. *Id.* The ALJ did add, however, that the overall effect of the technical violations[7] was sufficient to disqualify United, *on a*

[5] The ALJ concluded that no reliance could be placed on the FCC measurements which formed the basis for two of the violations. Pet. App. D 145. Both of these involved allegations of repeated conduct by United. However, only one of the 22 alleged incidents was established by testimony relative to charged violation 18, and only two of nine were so established relative to charged violation 19.

[6] Of the seven established violations, two involved meter readings. *See* paragraphs 98-103 of the Initial Decision. Pet. App. D 63-67. However, since the FCC failed to take into account meter tolerances for the measurements recorded, the effect of these two violations must be discounted. *See United States* v. *Rust Communications Group, Inc.*, 425 F. Supp. 1029 (E.D. Va. 1976).

[7] With respect to the religious programming issues, the ALJ concluded that the licensee had not broadcast lottery information in

comparative basis only, relative to the Community application. Accordingly, the ALJ denied the United application for renewal and granted Community's competing application.

On appeal to the full FCC, the ALJ's decision denying the United application was affirmed. However, with respect to the ALJ's specific conclusions relative to the religious programming issues,[8] the FCC reversed the ALJ and found that, by permitting the broadcast of numbers information on Station WOOK, United had violated the federal law prohibiting the broadcast of information concerning lotteries,[9] and that that violation alone mandated denial of the renewal application. Pet. App. B 4-6, 8-13.[10] In addition, the FCC held that United failed to take reasonable measures to protect its listeners from false, misleading and deceptive advertisements such as those for roots and sacrificial baths, and that this failure, also, man-

---

violation of 18 U.S.C. § 1304 or § 73.122 of the FCC's Rules. Pet. App. D 141. Further, the ALJ concluded that United had taken reasonable precautions relative to the advertisement of roots, spiritual baths and the like. However, the ALJ concluded that the broadcasts offering three-digit scripture references to be used for financial blessings were false, misleading and deceptive, that they constituted an improper use of the station, and that United had not taken any effective steps to prevent such use. These conclusions did *not,* however, enter into the ALJ's decision to assess even a "comparative disqualification" against United. Pet. App. D 152.

[8] See note 7, *supra.*

[9] 18 U.S.C. § 1304.

[10] United continues to contend that the ALJ's determination concerning the broadcast of lottery information was correct. The correctness *vel non* of the ALJ's decision on this point is not relevant to this Petition, however, since the lower court declined to reach that issue.

dated denial of the renewal application. Pet. App. B 14-15.

In reversing the ALJ on these points, the FCC specifically rejected United's argument that, in order to hold United responsible for the allegedly fraudulent content of the programs, the FCC would have to involve itself in an unconstitutional inquiry into the truth or falsity of the religious programs themselves. Summing up its response to this argument, the FCC stated

> In view of the facts that numbers references are not part of any religious creed, that the representations of the ministers concerning financial blessings *defy belief* [footnote omitted], and that United failed to show that the ministers had enabled their listeners to receive financial blessings or that the ministers *honestly believed* they could help their listeners get financial rewards by playing the numbers which they furnished [footnote omitted], we conclude that our action here does not violate the constitutional restraints of the First Amendment. [Emphasis added]

Pet. App. B 7-8. Having said that, the FCC proceeded to scrutinize in great detail the religious programming of Station WOOK and United's position relative to that programming.

The FCC's analysis of the religious programming issue comprised 13 of the opinion's 14 paragraphs devoted to a discussion of United's application. The remaining paragraph recited the general history of United's technical difficulties. This last paragraph, without any indication of the basis of the FCC's disagreement with the ALJ's conclusions, and without

even a cursory discussion or description of the nature, number or extent of the specific violations established,[11] concluded that the United application must be denied "on the basis of [United's] violations of the technical rules standing alone." Pet. App. B 17.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the FCC was affirmed solely on the basis of this last holding with respect to the disqualifying effect of the technical violations.[12] The lower court, in its one paragraph *per curiam* opinion, declined to reach the significant question raised by United concerning the constitutionality of the FCC's actions relative to United's religious programming. United's Petition for Rehearing and/or Suggestion for Rehearing *En Banc,* which sought to raise the constitutional questions discussed below, was similarly summarily rejected.

REASONS FOR GRANTING THE WRIT

This case warrants review in this Court because to leave the constitutional aspects of the FCC's decision undisturbed would be to sanction an indirect regulation of the truth of religious programming, a subject the FCC is prohibited by the Constitution and Section

[11] The FCC did affirm, with limited modifications, the ALJ's findings relative to the technical issues. The modifications, which consisted of rulings on several Broadcast Bureau exceptions, did not increase the number of adverse findings. Thus, while the FCC's single paragraph affirmance of the technical issue findings makes only general reference to the fact that 19 violations were originally charged, the record continues to reflect only seven established violations. See text, *supra,* at 7.

[12] The jurisdiction of the lower court was based upon Section 402(b) of the Communications Act, 47 U.S.C. § 402(b).

326 of the Communications Act from regulating directly.[13] The decision of the lower court reflects an

> apparent unwillingness to look at the reality of the relationship between the Commission and the licensees in favor of a circumspect examination of specific incidents of regulatory activity.

Illinois Citizens Committee For Broadcasting v. *FCC,* 169 U.S. App. D.C. 166, 194, 515 F.2d 397, 425 (1974) (Bazelon, C.J., statement on why he voted to rehear the case *en banc*). *See also Brandywine-Main Line Radio, Inc.* v. *FCC,* 153 U.S. App. D.C. 305, 366 and n. 60, 473 F.2d 16, 77 and n. 60 (1972) (Bazelon, C.J., dissenting) (regulation by the "lifted eyebrow"); *Writers Guild of America, West, Inc.* v. *FCC,* 423 F. Supp. 1064, 1147-51 (C.D. Cal. 1976) (regulation by threat of regulation); Note, "Regulation of Program Content by the FCC", 77 Harv. L. Rev. 701, 703 (1964). Because of the FCC's position relative to its licensees, Commission statements which appear to set policies or guidelines can have a substantial effect on

[13] *See Illinois Citizens Committee For Broadcasting* v. *FCC,* 169 U.S. App. D.C. 166, 176 and n. 1, 515 F.2d 397, 407 and n. 1 (1974) (Bazelon, C.J., statement on why he voted to rehear the case *en banc*):

> The heart of the case lies in the realities of the relationship between the Federal Communications Commission and radio licensees. . . . The main threat is, of course, that the government can put a licensee out of business but I suppose that the more pervasive threat lies in the *sub rosa* bureaucratic hassling which the Commission can impose on the licensee. . . . For better or worse, a licensee confronted with the choice between an economic disadvantage and pleasing the government through curtailment of a constitutional right will generally choose curtailment. Thus, licensee political or artistic [or in this case, religious] expression is particularly vulnerable to the "raised eyebrow" of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury.

the policies of the licensed broadcasters regardless of the context of the FCC's statements. The instant situation is a case in point. The effect of the FCC's decision and the lower court's affirmance of that decision is to put all broadcasters on notice that they will be subject to the religious broadcast standards set forth in the FCC's decision. It does not matter that those standards impose an unconstitutional burden on broadcasters, nor does it matter that the standards were set out with respect to only one licensee. Broadcasters, unwilling or unable to risk a threat to their licenses, will accept and abide by the FCC's standards.

The crucial reason for granting the writ in this case is that the FCC has succeeded, intentionally or otherwise, in insulating its unconstitutional religious broadcasting statements from judicial review. This result arises from the FCC's finding that the technical violations alone were sufficient to warrant denial of United's renewal application. The lower court, apparently deferring to the agency's expertise in technical matters, affirmed on that ground alone. In this case, however, it is readily apparent that the technical violations involved were in fact not of a disqualifying nature. The ALJ in a detailed opinion expressly so found, and the FCC, in its one paragraph reversal of that finding, offered no basis for its disagreement with the ALJ. Thus, by engaging in extended discussion of religious broadcasting, and by conclusorily articulating an independent "technical" ground for its action, the FCC has effected, and simultaneously precluded judicial review of, unconstitutional regulation which will chill the conduct of broadcasters. An agency must not be permitted to foreclose judicial review of its decisions in this fashion. Important constitutional questions can-

not be insulated from review by the mere assertion of "technical" factors. Review by this Court is appropriate in order to provide lower courts with standards of review with which to analyze and resolve the recurring question raised by situations such as the present one, where unconstitutional action has been permitted to stand as a result of judicial deference to "technical" agency expertise.

I. The FCC's Action, Left Undisturbed By The Lower Court, Represents An Unconstitutional Infringement Affecting The Entire Broadcasting Industry.

The FCC mandated, and the lower court left undisturbed, the impossible and unconstitutional requirement that licensees, to protect themselves from disqualifying charges of fraudulent and deceptive practices, be able to establish that claims made in religious broadcasts are true, that spiritual teachings, if followed, will produce the promised result. Pet. App. B 14-15. The FCC already had concluded that the representations of the ministers whose sermons were broadcast on Station WOOK "defy belief",[14] apparently forgetting that, under the First Amendment, "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *United States* v. *Ballard*, 322 U.S. 78, 86 (1944).[15] Moreover,

---

[14] Pet. App. B 7.

[15] Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet

"[r]eligious beliefs are not required to be consistent, or logical, or acceptable to others." *Stevens* v. *Berger,* 428 F. Supp. 896, 899 (E.D. N.Y. 1977), citing *United States* v. *Ballard, supra* at 86; *Cantwell* v. *Connecticut,* 310 U.S. 296, 303 (1940).

The courts have held that only the most limited inquiry is permissible into religious beliefs to determine whether those beliefs are entitled to constitutional protection under the First Amendment. *See generally Wisconsin* v. *Yoder,* 406 U.S. 205, 215 and n. 6 (1972); *United States* v. *Ballard, supra* at 86-87; *Cantwell* v. *Connecticut, supra* at 307, 310; *Teterud* v. *Burns,* 522 F.2d 357, 360 (8th Cir. 1975); *Stevens* v. *Berger, supra* at 899. Such inquiry at most can be directed only to finding that the beliefs are religious in nature and to finding that those religious beliefs are sincerely held. The inquiry must never attempt to establish the absolute truth or falsity of those religious beliefs.

> A religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights. Popularity, *as well as verity,* are inappropriate criteria.

Stevens v. *Berger, supra* at 899 (emphasis added). It is this impermissible element of truth that renders the FCC's decision unconstitutional.

The Court should consider also the context within which this unconstitutional burden to prove the truth of religious programming has been imposed on licensees, namely in a license renewal proceeding. It is

---

the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

United States v. *Ballard,* 322 U.S. 78, 86-87 (1944).

well established that when a First Amendment issue is presented in a case, it is the government's burden to defend the regulation impacting on protected religious beliefs, *Wisconsin* v. *Yoder, supra* at 215-16; *Sherbert* v. *Verner,* 374 U.S. 398 (1963), and the presumption is that the regulation is invalid. In a renewal proceeding, the burden of proving that renewal is in the public interest is on the licensee, and, under the FCC's decision left standing by the lower court in the instant case, a licensee accused by the FCC of broadcasting religious programming that defies the FCC's belief must be able to prove that the programming was absolutely truthful.

The chilling effect on the exercise of First Amendment rights of forcing the citizen to prove his speech is protected has been held to be unconstitutional in other factual settings. *See e.g., Freedman* v. *Maryland,* 380 U.S. 51, 58 (1965) (state film censorship board must bear burden of proving material is obscene); *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958) (state cannot place burden on taxpayer to prove that he is not a criminal syndicalist as a condition of qualifying for a tax exemption). The FCC's unconstitutional shifting of its burden to licensees further underscores the significance of the fact that, to effect this shifting, the FCC has used an indirect method which will not be subject to judicial review.

United did all that the FCC could constitutionally require licensees to do regarding religious programming, and it was nonetheless penalized for its religious programming. Further, all other broadcast licensees are also being penalized in that they are now subject to the chilling effect of the unconstitutional standards

adopted by the FCC relative to religious programming. The public importance of these factors warrants review by this Court of the affirmance by the court below of the FCC's decision.

II. The Violation Of Certain Technical Rules Of The FCC Was Not An "Independent" Reason For United's Disqualification And Cannot, Standing Alone, Support The FCC's Denial Of The United Application.

The lower court held that United's "breach of the Commission's rules of technical operation" was an "independent reason" for United's disqualification as a licensee, and the lower court affirmed the FCC "on the basis of its discussion of this issue." Pet. App. A. However, the violations issue was not in fact independent of the FCC's unconstitutional inquiry into the truth of the content of United's religious programming. Moreover, the FCC gave such little consideration to this violations issue that there is no "discussion of [it]"[16] on which the lower court's opinion can validly rest.

The overriding concern of the FCC with respect to United's renewal application was the content of United's religious programming, and the nub of the case consisted of an evaluation of that programming rather than of the technical rules violations charged to United. This point is evidenced in the extended discussion of the religious programming content both by the ALJ and by the FCC.

It was only in one brief paragraph of an eleven page decision that the FCC concluded that the violations of the technical rules "standing alone" would justify

[16] Pet. App. A 2.

denying United's renewal application. 55 FCC 2d 416, 424 (¶ 16), Pet. App. B 16-17. In contrast, the FCC emphasized United's religious programming throughout the decision; it is clear that its emphasis improperly influenced the FCC's decision to disqualify United as a licensee. For example, because of United's religious programming, to which the FCC failed to accord the requisite constitutional protection, the FCC concluded United failed to provide "responsible supervision over program content." 55 FCC 2d at 418-19, Pet. App. B 6. In addition, the FCC decided that United permitted an "improper use of its facilities" in broadcasting the religious programming involved in this case. 55 FCC 2d at 420, Pet. App. B 9. It is obvious that the FCC then concluded that when such an "irresponsible" licensee also is charged with technical rules violations that licensee ought to be disqualified. The FCC has not shown, nor can it show, how disqualification is justified in this case when the improper religious inquiry effects have been removed and the technical rules violations stand alone.

There was no discussion by the FCC of the *established* violations[17] in light of the FCC precedent that in order to be disqualifying, violations must be of such a number, nature, and extent that the public is deprived of service. *See Heart of the Black Hills Stations,* 32 FCC 2d 196 (1971), *aff'd,* No. 72-1804 (D.C. Cir., February 26, 1973) (violations resulted in a nonviewable picture); *Charles C Carlson,* 12 FCC 902 (1948), *aff'd per curiam sub nom. Carlson* v. *FCC,* 84

[17] In asserting that the technical rules violations would, "standing alone", disqualify United as a licensee, the FCC referred to the number of violations *charged* against United rather than the number *established*. See pp. 7-10, 11-12, and note 14, *supra*.

U.S. App. D.C. 415, 172 F.2d 766, *cert. denied,* 337 U.S. 930 (1949) (numerous violations included excessive frequency deviation and spurious radiation); *Brooklyn Broadcasting Co.,* 4 FCC 521 (1937) (station was unable to broadcast at the time authorized by its license). The violations established against United fell far short of these serious, service-depriving violations. Nor were the violations in any way "willful" so to warrant the disqualification punishment. *The Court House Broadcasting Co.,* 21 FCC 2d 792 (1970). Indeed the ALJ who heard all the evidence in the case concluded that United was in fact basically qualified to remain a licensee so far as technical matters were concerned.

There were only seven violations established,[18] and they related to measurement and logging requirements and were *not* of a nature characterized as "more serious" in *Charles C. Carlson, supra.* The violations specifically involved making equipment performance measurements, recording results of the daily observation of tower lights (there was no indication the lights were not on), a delay in producing the maintenance logs for the FCC's inspector, failure on two occasions to notify the engineer in charge of a reduced power condition, and "writing over" instead of "lining-through" 234 log entries—a mere .96% of the 30,240 entries made. Not one of these violations had any effect whatsoever on other stations or on the licensee's direct service to the public. It is clear from the nature of these violations that the FCC's disqualification order could not "stand alone" on these violations but was instead primarily based on United's religious programming.

---

[18] See pp. 7-10, above.

The few established technical rules violations, when considered without the improper conclusions about United's religious programming, are not alone a legally sufficient or independent ground to disqualify United as a licensee. It is apparent from this record that more, namely the content of United's religious programming, was involved in the FCC's disqualification order, and that such a departure from the accepted and usual course of procedure warrants review by this Court.

III. Agencies Must Not Be Permitted To Use Assertedly Independent Technical Grounds To Shield Important Constitutional Questions From Judicial Review.

A licensee's vulnerability is especially acute when violations of minor technical rules can be used by the FCC as a pretext for the exercise of control over the content of religious programming. This is precisely what has happened in the instant case—while relying, however conclusorily, on the assertedly "independent" technical violations ground for disqualification, the FCC proceeded to articulate unconstitutional standards relative to religious programming. These standards, while developed in a particular adjudicatory proceeding, are quite obviously applicable to all broadcast licensees. The result of this indirect regulation, of course, is that no licensee is likely to risk using religious programming material unless it conforms to an orthodoxy which can be expected not to defy the FCC's own belief. This dangerous result is made all the more ominous by the fact that, unless the requested writ is granted, the unconstitutional regulation will completely escape judicial review, and its chilling effect will continue unabated.

Judges in a number of lower courts have demonstrated concern for the problem created by agencies seeking to accomplish impermissible ends through some form of regulation by "raised eyebrow", that is, regulation which is insulated from effective judicial review. *See Brandywine-Main Line Radio, Inc.* v. *FCC,* 153 U.S. App. D.C. 305, 473 F.2d 16 (1972), *cert. denied,* 412 U.S. 922 (1973) (Bazelon, C.J., dissenting); *Robinson* v. *FCC,* 118 U.S. App. D.C. 144, 334 F.2d 534, *cert. denied,* 379 U.S. 843 (1964) (Wright, J., concurring in the denial of rehearing); *Writers Guild of America, West, Inc.* v. *FCC, supra.* However, with the exception of the *Writers Guild* case, no case has presented a set of circumstances so egregious as to warrant full judicial inquiry into the action.

Both the *Brandywine-Main Line* case, *supra,* and the *Robinson* case, *supra,* involved the denial of broadcast licenses. The FCC's opinions in both cases affected the First Amendment rights of broadcasters generally. However, the FCC in each case also found that misrepresentations made to it by the licensee warranted denial of the license independently of any inquiry into the licensee's programming policies. *See Brandywine-Main Line Radio, Inc.,* 24 FCC 2d 18 (1970), *reconsideration denied,* 27 FCC 2d 565 (1971), *aff'd sub nom. Brandywine-Main Line Radio, Inc.* v. *FCC, supra; Palmetto Broadcasting Co.,* 33 FCC 250 (1962), *reconsideration denied,* 34 FCC 101 (1963), *aff'd sub nom. Robinson* v. *FCC, supra.* The FCC was affirmed in both cases on the basis of this independent, nonconstitutional ground. Even so, members of the affirming courts noted the potentially serious problem inherent in those affirmances, i.e., that, regardless of the narrowness of the court's action, affirmance on an independent, non-constitutional ground could let stand unconstitutional intrusions into First Amendment rights.

Such a situation confronts this Court in the instant case. Moreover, there are two crucial distinctions between this case and the *Brandywine-Main Line* and *Robinson* situations which support the issuance of the requested writ in this case.[19]

First, in both *Brandywine-Main Line* and *Robinson,* the FCC's opinion provided the reviewing court with a detailed analysis of the facts and circumstances surrounding the misrepresentations involved. *See Brandywine-Main Line Radio, Inc.* v. *FCC, supra* at 351, 473 F.2d at 62 ("The [Commission's] opinion is complete, thorough, thoughtful and carefully based on the law. The sanction imposed by the Commission is fully supported by the record."). Thus, the reviewing court was able to assure itself that the FCC's action had substantial basis in the record. In the instant case, the FCC's terse paragraph reversing the ALJ's conclusions with respect to the effect of the technical violations is no more than conclusory, providing the reviewing court with virtually no analysis whatsoever of the FCC's reasoning.

Second, the independent ground of misrepresentation relied on in *Brandywine-Main Line* and *Robinson* is of a far greater seriousness than are the relatively

---

[19] United does not concede that the Courts of Appeals in *Brandywine-Main Line* and *Robinson* were correct in failing to consider and dispose of the constitutional issues confronting them. In any event, as outlined above, the present case provides a far more compelling basis for full judicial review than either *Brandywine-Main Line* or *Robinson.*

minor technical violations involved in this case. It is generally accepted that the integrity of the entire regulatory process depends on an agency's ability to rely on the representations of its licensees. *See FCC* v. *WOKO,* 329 U.S. 223 (1946). Thus, established misrepresentations such as those in *Brandywine-Main Line* and *Robinson* constitute a grave threat to the regulatory process and must be dealt with severely. The same severity cannot attach to the rule violations here in question. Those rules are mere minor elements of the very broad technical regulatory structure devised by the FCC. Their violation is customarily treated by the FCC as grounds for reprimand or civil forfeiture, not revocation or denial of license. Their violation certainly does not pose any serious threat to the FCC's ability to regulate. Accordingly, the FCC should not be permitted to foreclose judicial review by reliance on these technical violations, thereby letting stand clearly unconstitutional action.

It is United's position that, when a reviewing court is presented with apparently unconstitutional agency action in support of which an independent, non-constitutional ground is advanced, the court must scrutinize closely that assertedly independent ground. In particular, the reviewing court should examine the nature of the ground, in order to determine whether it is of such legitimate importance that constitutional questions may properly be left unreviewed. In addition, the reviewing court should examine the agency's treatment of the ground, in order to assure itself that the ground was supported by substantial evidence, and was not, in fact, an unsupported ground shielding even constitutional aspects of the agency's action from effective review.

In the instant case, the nature of the independent, technical ground relied upon by the FCC is insubstantial, and discussion by the FCC of that ground is almost non-existent. Further, in the instant case it is clear that the effect of the agency's action will be to curtail or eliminate the broadcast of religious programming as a direct result of the chilling effect the action will have on the broadcasting industry. It is equally clear that, unless the requested writ is granted judicial review of that action will be precluded through the pretextual "independent" technical ground. When confronted by such circumstances, a reviewing court should carefully analyze the agency's assertions, in order to assure itself that the agency is not simply creating a situation whereby unconstitutional regulation will be permitted to pass unchallenged. The lower court, in its one paragraph affirmance of the FCC's decision, failed to analyze this question at all.

To permit the FCC's action in the instant case, along with its accompanying, industry-wide chilling effect, to stand because of the asserted existence of an "independent" basis for affirmance would improperly elevate notions of judicial deference to agency expertise far above the guarantees of the Constitution. Certiorari is justified in this case in order to defeat the FCC's particular circumvention of the clear prohibitions of the First Amendment. Certiorari is further justified in order to permit this Court the opportunity to formulate standards with which lower courts may analyze ostensibly legitimate agency conduct which in fact masks unconstitutional regulation.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

HARRY M. PLOTKIN
THOMAS SCHATTENFIELD
DAVID TILLOTSON
HARRY F. COLE
1815 H Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

November, 1977